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SUPREME COURT, U. S.

No. 186

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In the Supreme Court of the United States

OCTOBER TERM, 1969

IOWA PUBLIC SERVICE COMPANY, PETITIONER

v.

IOWA STATE COMMERCE COMMISSION AND THE UNITED STATES BUREAU OF RECLAMATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF THE UNITED STATES BUREAU OF RECLAMATION AND THE OTHER FEDERAL RESPONDENTS

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OPINIONS BELOW

The opinions of the district court are unreported. The opinion of the court of appeals (Pet. App. 4-11) is reported at 407 F.2d 916.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1969. The petition for a writ of certio-

rari was filed on May 31, 1969. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's suit seeking to restrain the Bureau of Reclamation from selling electric power to certain Iowa municipalities was properly dismissed.

STATUTE INVOLVED

The "Federal Reclamation Laws" (43 U.S.C. 371, *et seq.*) provide, in pertinent part (43 U.S.C. 485h (c)):

> Any sale of electric power * * * shall be * * * at such rates as in [the Secretary of the Interior's] judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost * * *: *Provided* * * *, That in said sales * * * preference shall be given to municipalities and other public corporations or agencies; * * *.

STATEMENT OF THE CASE

Petitioner Iowa Public Service Company filed a complaint with the Iowa State Commerce Commission (hereinafter the "Commission") naming as defendants the United States Bureau of Reclamation, an agency of the Department of the Interior (hereinafter the "Bureau"), the Secretary of the Interior, and various officials of the Bureau. The complaint alleged that the Bureau, in arranging to dispose of electric power to certain Iowa municipalities, was acting in violation of Iowa law, and that the Bureau

was a "public utility," as defined in Section 490A.1, of the Iowa Code, which authorizes the Commission to "regulate the rates and services of public utilities."

The Bureau responded by letter to the Company's complaint, pointing out that the challenged sale of power to the municipalities had been undertaken by the federal defendants pursuant to duties imposed by the Constitution and statutes of the United States, specifically the Federal Reclamation Laws (43 U.S.C. 485h(c)), which accord a preference to municipalities in the sale of power generated at federal hydroelectric projects. The letter further requested the Commission to dismiss the complaint for, among other things, lack of jurisdiction.

Petitioner answered the Bureau's letter with its own letter. After receiving both letters, the Commission dismissed the complaint, giving as its reasons (see Pet. App. 5, n. 2):

> 1. That the Respondent, United States Bureau of Reclamation, is not a public utility as defined by Sec. 490A.1, Code of Iowa, 1966.
>
> 2. That the acts of the [federal defendants] * * * complained of are authorized by the Constitution and Laws of the United States and are outside the regulatory jurisdiction of this Commission.
>
> 3. That even if the United States Bureau of Reclamation were a public utility as defined by Sec. 490A.1, the extensions of service complained of are specifically exempted from the provisions of Sec. 490A.24, Code of Iowa, 1966.
>
> 4. That the Commission is satisfied with respect to the Complaint.

5. That there are no reasonable grounds for investigating said Complaint.

Review of the Commission's dismissal was sought by petitioner in an Iowa state court. Named as defendants were the Commission, its members, and the previously named federal defendants. On petition by the federal defendants, the case was removed to the United States District Court for the Southern District of Iowa, pursuant to 28 U.S.C. 1442(a)(1), as a suit against federal officials acting under "color of office" (see Pet. App. 6).

The district court denied petitioner's motion to remand the cause to the state court, and granted defendants' motion to dismiss the suit. On appeal the dismissal was upheld. The court of appeals rejected "the contentions of the Company, including lack of due process," and ruled that "the findings, both factual and legal, of the Iowa Commission are entirely proper and that the procedure utilized was warranted under Iowa law and does not contravene federal constitutional requirements" (Pet. App. 7). Moreover, the court noted, the suit must in any event be dismissed and the judgment below affirmed since the activities of the Bureau and respondent federal officials, in selling the hydro-electric power to Iowa municipalities, "are protected by the Supremacy Clause * * * from interference by state regulation or control," [1] and since

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[1] See, *e.g.*, *Public Utilities Commission of California* v. *United States*, 355 U.S. 534; *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239.

"an unconsented suit against the federal government, a sovereign power," was involved[2] (*ibid.*).

ARGUMENT

Petitioner's suit seeks to enjoin an instrumentality of the federal government from selling electric power to certain Iowa municipalities. There can be no serious doubt that the suit was properly dismissed for the two fundamental reasons emphasized by the court below, *i.e.*, that such sales are protected by the Supremacy Clause and that the United States was immune from the instant suit. Indeed, petitioner does not—and, we submit, cannot—directly challenge the ruling below. Instead, it seeks to avoid the impact of that decision by contending that the Commission violated due process by refusing to grant it a hearing at which it could introduce evidence. That contention is without merit, and no conflict of decisions is even suggested. Thus, further review is not warranted.[3]

1. That the "due process" argument lacks merit is made clear by the fact that the Commission's decision was reached upon consideration of the complaint and the written submissions by both parties. Those documents on their face contain all the facts necessary to support the Commission's dismissal of the complaint. Accepting as true the complainant's allegation that

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[2] See, *e.g.*, *Hawaii* v. *Gordon*, 373 U.S. 57; *United States* v. *Sherwood*, 312 U.S. 584, 587.

[3] Even if an administrative procedural irregularity of due process proportions is assumed, petitioner's suit was nonetheless properly dismissed, at least as to the federal defendants, for the two fundamental reasons noted previously.

the Bureau was violating state law, the Commission needed no additional facts to justify its conclusion that the Bureau was not a "public utility" under Iowa law, and was thus without its regulatory jurisdiction. Moreover, petitioner was allowed to submit to the Commission in writing its reasons for opposing the dismissal of the complaint, and in fact did so. In these circumstances, there is no requirement that the state agency grant an evidentiary hearing to establish the existence of facts already assumed to be true. Cf. *Hannah* v. *Larche*, 363 U.S. 420.

Petitioner apparently contends, in addition, that the Commission's failure to grant an evidentiary hearing contravened state law. This contention, however, is controverted by express provisions of Iowa law. Thus, Section 490A.3 of the Iowa Code provides, in pertinent part:

> Whenever there is filed with the commission by any person or body politic * * * a written complaint requesting the commission to determine the reasonableness of * * * anything done or omitted to be done by any public utility * * * such written complaint thus made shall be forwarded by the commission to such public utility, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the commission. If such public utility shall not satisfy the commission with respect to the complaint within the time specified and there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to promptly initiate a formal proceeding. * * *

This statute requires the Commission to hold a hearing only when the defendant does "not satisfy the commission" that there is no basis to the complaint; it contains nothing requiring a hearing when the Commission is satisfied, on the basis of the complaint and written submissions before it, that it lacks jurisdiction. Consequently, the contention that the Commission violated state law is without substance.

2. Petitioner's remaining point is equally untenable. It is inaccurate to maintain that the suit sought no relief against the federal government or its officials, and hence was improperly removed to a federal court. As the court of appeals stated, petitioner's action "sought to restrain the United States government acting through its employees and agents from disposing of electrical power" (Pet. App. 4). It is obvious, therefore, that relief was sought against the federal government and its officials. In fact, that that was the basic purpose of petitioner's suit was acknowledged by its naming the Bureau and the federal officials as defendants.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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